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NO. 87-1160

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

DUQUESNE LIGHT COMPANY
and
PENNSYLVANIA POWER COMPANY,
Appellants

v.

DAVID M. BARASCH,
CONSUMER ADVOCATE, et al.
Appellees

On Appeal From The Supreme Court Of Pennsylvania

MOTION OF APPELLEE, DAVID M. BARASCH, CONSUMER ADVOCATE, TO DISMISS OR AFFIRM

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MOTION OF DAVID M. BARASCH, CONSUMER ADVOCATE, TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1, Appellee David M. Barasch, Consumer Advocate (hereinafter, Office of Consumer Advocate or OCA)*, hereby moves that this Honorable Court dismiss the appeal of Duquesne Light Company and Pennsylvania Power Company, on the ground that the appeal does not present a substantial federal question. In the alternative, the OCA moves that the Court affirm the decision of the Supreme Court of Pennsylvania rendered below.

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*The OCA is an agency of the Commonwealth of Pennsylvania authorized to represent the interests of Pennsylvania utility consumers before the Pennsylvania Public Utility Commission and other state and federal agencies and courts which regulate the activities of Pennsylvania's public utilities. 71 Pa. Stat. Ann. §309-1 et seq. (Purdon Supp. 1987). Appellee, David M. Barasch, has served as the Consumer Advocate of Pennsylvania since 1984.

COUNTERSTATEMENT OF THE CASE

This is an appeal by two electric utilities from a Pennsylvania Supreme Court Order which found that the Pennsylvania Public Utility Commission (hereinafter, PUC or Commission) had erred as a matter of law by requiring ratepayers to bear the costs of four power plants which were abandoned prior to construction and which therefore never provided service to those ratepayers.

In two general rate increase proceedings before the PUC, the utilities involved, Duquesne Light Company (hereinafter Duquesne) and Pennsylvania Power Company (hereinafter Penn Power), requested and received the right to recover from ratepayers, over a ten-year period, all money invested by the utilities in the abandoned projects. These rate allowances were

appealed by the OCA, but were initially upheld by a 4-3 vote of the Commonwealth Court of Pennsylvania.

The Commonwealth Court Order was reversed by the Pennsylvania Supreme Court, which unanimously ruled in an Opinion by Chief Justice Nix that the PUC Order violated the Pennsylvania Public Utility Code. Specifically, the Supreme Court agreed with the OCA's position that the allowance of rate recovery of the cost of a cancelled power plant violated Section 1315 of the Public Utility Code, 66 Pa. Cons. Stat. §1315. That provision states, with certain exceptions not pertinent here, that:

> the cost of construction or expansion of a facility undertaken by a public utility producing, generating, transmitting, distributing or furnishing electricity shall not be made a part of the rate base nor otherwise included in the rates charged by the electric utility until such time

> as the facility is used and useful in service to the public.

Section 1315 further states that:

> Except as stated in this section, no electric utility property shall be deemed used and useful until it is presently providing actual utility service to the customers.

Because there was no dispute that the abandoned plants at issue never have and never will provide actual service to customers, the Supreme Court agreed with the OCA's position that, as a matter of state law, the costs of those plants could not be charged to ratepayers. The Court also noted that this interpretation of Section 1315 was consistent with "the fundamental principles of this state's public-utility jurisprudence", i.e., that "no utility of any type is permitted, without express and valid legislative authorization, to charge ratepayers for property which is not used and useful in the production of

current utility service." 532 A.2d 325, 338 (App. 28a-29a).

The Supreme Court remanded the matter to the Commission for proceedings consistent with its Opinion. Duquesne and Penn Power then took the present appeal to this Court.

Before addressing the Companies' arguments, certain factual points should be noted.

First, as stated by Duquesne and Penn Power in their Jurisdictional Statement at 4, the four plants at issue here were cancelled prior to the issuance of a construction permit by the Nuclear Regulatory Commission. Thus, only "pre-construction" expenditures for such items as engineering and siting analyses are at issue here. Id.

For Duquesne, the total costs of the projects amounted to $34,697,389. (App.

37c). The annual expense allowance permitted for the ten-year amortization of this amount was $3,469,739. Id. This allowance was a relatively small component of an overall rate increase of $105,850,000, which brought Duquesne's total annual revenue allowance from its Pennsylvania jurisdictional ratepayers to $802,463,063. (App. 126c).

Penn Power's share of the costs in question amounted to $9,569,665, with the annual amortization allowance equal to $956,967. (App. 81e-82e). This allowance was part of a $15,364,000 rate increase, which raised Penn Power's annual allowed revenues to $184,186,000. (App. 3e-4e).

Finally, it should be noted that the majority of the ownership in these four abandoned units was held by three Ohio utilities. As in Pennsylvania, the Ohio

Public Utilities Commission initially permitted the recovery of the costs of these units from ratepayers, but that allowance was overturned as violative of state law by the Ohio Supreme Court. Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981). The appeal of Cleveland Electric Illuminating Company (CEI) from that Ohio Supreme Court decision -- as well as CEI's subsequent appeals from two related orders regarding this same issue -- were summarily dismissed by this Court at 455 U.S. 914 (1982), 459 U.S. 1094 (1983), and 464 U.S. 802 (1983).

As set forth in the following Argument, the OCA respectfully submits that the appeal of Duquesne and Penn Power regarding this identical issue in the present case should be summarily dismissed as well.

ARGUMENT

I. The Arguments Raised In This Case Have Been Summarily Rejected By This Court.

As noted by the Appellants at page 13, note 13, of their Jurisdictional Statement, this is not the first case in which this Court has been asked to review state rate orders which denied recovery of the cost of cancelled power plants. Indeed, three of the four appeals cited by Appellants involved the very same plants at issue here, the difference being that the prior cases involved Ohio law, while the present case was decided under Pennsylania law.

In each of the cases noted by Appellants, the highest state court found that the recovery of cancelled plant costs was violative of state public utility law. See Northern Indiana Public Service Co. v. Citizen's Action Coalition of Indiana, Inc., 485

N.E.2d 610 (Ind. 1985), appeal dismissed and cert. denied, 106 S.Ct 2239 (1986); Cleveland Electric Illuminating Co. v. Public Utilities Commission, 4 Ohio St. 3d 107, 447 N.E.2d 746, appeal dismissed, 464 U.S. 802 (1983); Cleveland Electric Illuminating Co. v. Public Utilities Commission, No. 82-165 (Ohio, July 7, 1982), appeal dismissed, 459 U.S. 1094 (1983); Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), appeal dismissed sub nom. Cleveland Electric Illuminating Co. v. Office of Consumers' Counsel, 455 U.S. 914 (1982). The utilities in each of those cases appealed to this Court on the ground that the denial of such costs represented an unconstitutional confiscation of their property. Each of those appeals was summarily rejected by

this Court either for lack of jurisdiction, lack of a properly presented federal question, or -- in the Cleveland Electric Illuminating appeal at 464 U.S. 802 -- for want of a substantial federal question. A dismissal for want of a substantial federal question is, of course, a decision on the merits. See Meek v. Pittenger, 421 U.S. 349, 367 n.16 (1975).

The Appellants attempt to distinguish the Cleveland Electric Illuminating dismissal on several grounds, including the obvious fact that the case did not involve Pennsylvania law. Jurisdictional Statement at 13 n.13. The OCA would note, however, that, on the same day that this Court disposed of the above-cited appeal of Northern Indiana Public Service Company, the Court also dismissed, for want of a

substantial federal question, the appeal of two Pennsylvania electric utilities who challenged the denial of cost recovery on their investment in the Three Mile Island Unit 1 nuclear power plant. That plant was not abandoned, but was out of service for a prolonged period due to an accident at the adjacent Three Mile Island Unit 2. Pennsylvania Electric Co. v. Pennsylvania Public Utility Comm'n, 509 Pa. 324, 502 A.2d 130 (1985), appeal dismissed sub nom. Metropolitan Edison Co. v. Pennsylvania Public Utility Commission, 106 S.Ct. 2239 (1986).

In the Pennsylvania Electric case, supra, the Pennsylvania Supreme Court relied on established principles of Pennsylvania law to find that the utilities had no right to charge ratepayers for the costs of a unit which was not "used and useful" in service to

the public. Moreover, the Pennsylvania Supreme Court ruled that the used and useful principle was not "overridden" by this Court's decision in FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), and that the investor interests discussed in the Hope case are not "of constitutional dimension, but are among the factors to be taken into account in the balancing of interests process." 509 Pa. at 334, 502 A.2d at 135-36. The utilities appealed that case to this Court, specifically raising the question of whether the Pennsylvania Supreme Court erred by finding that the investor interests in Hope were not of "constitutional dimension." No. 85-1493, October Term 1985, Jurisdictional Statement at i. The OCA and the Pennsylvania PUC moved to dismiss the utilities' appeal and, on May 27, 1986, the appeal was

dismissed by this Court for want of a substantial federal question. See also Jersey Central Power & Light Co. v. Board of Public Utilities, 466 U.S. 947 (1984), in which the parallel appeal of the New Jersey utility which owns a share of Three Mile Island was also dismissed for want of a substantial federal question.

The OCA recognizes that, as noted by Appellants here, this Court has stated that "although summary dispositions are decisions on the merits, the decisions extend only to 'the precise issues presented and necessarily decided by those actions.'" Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981), quoting, Mandel v. Bradley, 432 U.S. 173, 176 (1977). The OCA submits, however, that, in the Cleveland Electric Illuminating case reported at 464 U.S. 802 (1983), this Court "necessarily

decided" that the denial of rate recovery of the Ohio utilities' share of the plants at issue in this case was not confiscatory in violation of the United States Constitution. In addition, in the Pennsylvania Electric case reported at 106 S.Ct. 2239, this Court "necessarily decided" that the Pennsylvania Supreme Court's strict application of the used and useful principle was not constitutionally defective under the standards established by this Court in FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). Thus, the questions raised in the present appeal already have been decided by this Court.

Nevertheless, the OCA also recognizes that this Court has stated that "[i]t is not at all unusual for the Court to find it appropriate to give

full consideration to a question that has been the subject of previous summary action." Washington v. Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979).

While this Court thus may choose to examine the constitutionality of the Pennsylvania Supreme Court's refusal to permit recovery of cancelled plant costs -- even though the Court already rejected the appeals from the Ohio Supreme Court's refusal to permit recovery of costs on the same plants -- the OCA respectfully submits that this case represents a particularly poor choice for plenary review by this Court.

As set forth more fully below, the Appellants in this case are asking this Court to return to an era of judicial review where the minutiae of each state rate decision were separately judged for their constitutional validity. Rather

than calling for the clarification of this Court's decision in Hope, the Appellants here are therefore asking the Court to ignore the fundamental teachings of that case. The Appellants are also asking this Court to substitute its views of proper economic policy for those of the state legislature, a role which this Court has eschewed for decades.

II. The Appellants' Constitutional Challenges To The Pennsylvania Supreme Court Order Are Wholly Without Merit.

A. The Used And Useful Principle, As Applied By The Pennsylvania Supreme Court In This Case, Is Consistent With The Constitutional Protections For Utility Investors Recognized By This Court.

As can be seen by a review of the Pennsylvania Supreme Court decision, the primary issue before that Court revolved around the proper interpretation of state public utility law. Specifically, the Court unanimously agreed with the OCA that Section 1315 of the Pennsylvania Public Utility Code, 66 Pa. Cons. Stat. §1315, precluded the recovery from ratepayers of the costs expended on four power plants that were cancelled in their preliminary plannning stages and thus never provided service to ratepayers. (App 15a). As noted by the Court, Section 1315 specifically states

that the costs of an electric utility facility "shall not be made a part of the rate base nor otherwise included in the rates charged by the electric utility until such time as the facility is used and useful in service to the public." The statutory provision goes on to define the "used and useful" phrase by declaring that "no electric utility property shall be deemed used and useful until it is presently providing actual utility service to the customers."*

Faced with this statutory language, as well as the undisputed fact that the facilities in question are not now providing, and indeed never will

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* Section 1315, which was added to the Pennsylvania Public Utility Code by the Pennsylvania General Assembly's Act 335 of 1982, is reprinted in its entirety at pages 231-241 of the Appellants' Appendix.

provide, actual utility service to the customers, the Court stated:

> We therefore hold that section 1315 of the Code must be read as prohibiting an electric utility from recovering the costs of cancelled plants from ratepayers, either by making such costs part of the rate base or by converting them into operating expenses through amortization.

532 A.2d at 332 (App. 15a).

Moreover, the Court went on to note that this interpretation of Section 1315 was totally consistent with "the fundamental principles of this state's public-utility jurisprudence." Id. at 338 (App. 28a). Specifically, the Court declared:

> [I]t should be clear that no utility of any type is permitted, without express and valid legislative authorization, to charge ratepayers for property which is not used and useful in the production of current utility service.

Id. (App. 28a-29a).

Appellants here obviously cannot challenge the Pennsylvania Supreme Court's interpretation of Pennsylvania state law. Appellants do claim, however, that this application of Pennsylvania law results in an unconstitutional taking of their investment in these cancelled plants.

This claim is wholly without merit.

To the extent that utility investors have a constitutional right to recovery of costs on any specific investment, the limits of such a right were set forth by this Court 50 years ago in the case of Denver Union Stock Yard Co. v. United States, 304 U.S. 470 (1938). There, the Court held:

> As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not per se excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services. But it is not

> entitled to have included any property not used and useful for that purpose.

304 U.S. at 475 (citations omitted; emphasis added).

This fundamental holding of the Denver Union Stock Yard case was based on an unbroken series of Supreme Court decisions which addressed this issue, starting with Smyth v. Ames, 169 U.S. 466, 546-47 (1898), and continuing through such cases as San Diego Land and Town Co. v. National City, 174 U.S. 739, 757-758 (1899), San Diego Land and Town Co. v. Jasper, 189 U.S. 439, 446-467 (1903), Willcox v. Consolidated Gas Co., 212 U.S. 19, 41 (1909), Minnesota Rate Cases, 230 U.S. 352, 434, 454 (1913), Los Angeles Gas & Electric Co. v. Railroad Commission, 289 U.S. 287, 305-06, 311, 316-317 (1933), Columbus Gas & Fuel Co. v. Public Utility

Commission, 292 U.S. 398, 406-407 (1934), and St. Joseph Stock Yards Co. v. United States, 11 F. Supp. 322, 329 (W.D. Mo. 1935), aff'd, 298 U.S. 38 (1936).

Nor is the continued application of the used and useful principle somehow limited to public utility law of Pennsylvania. As noted in one recent opinion of the United States Court of Appeals for the District of Columbia:

> Although methods for determining values of rate base items have evolved since Smyth v. Ames, the precept endures that an item may be included in a rate base only when it is "used and useful" in providing service. In other words, current rate payers should bear only legitimate costs of providing service to them.

Natural Gas Pipeline Co. v. FERC, 765 F.2d 1155, 1157 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 794 (1986), quoting Tennessee Gas Pipeline Co. v. FERC, 606 F.2d 1094, 1109 (D.C. Cir.

1979), cert. denied, 445 U.S. 920 and 447 U.S. 922 (1980). Another recent D.C. Circuit opinion recognized that the used and useful principle "has stood as a bedrock principle of utility rate regulation" for "nearly a century." Kentucky Utilities Co. v. FERC, 760 F.2d 1321, 1324 n.4 (D.C. Cir. 1985).

While the used and useful principle typically is applied to cases involving the "rate base" or the investment on which the utility may charge a return, it is also applicable to questions involving the return of capital in investments which do not serve ratepayers.

Thus, for example, in the recent D.C. Circuit Natural Gas Pipeline case noted above, the Court upheld the Federal Energy Regulatory Commission's denial of the recovery of the pipeline company's investment in three

unsuccessful gas supply projects. 765 F.2d at 1156. Even though the utility did not seek to earn a return on this investment, the Court affirmed FERC's denial of recovery of the costs, based on FERC's rationale that "the expenditures were not used and useful to ratepayers." Id. at 1158.

Similarly, in the present case, the Pennsylvania Supreme Court recognized that the utilities could not recover their investments in non-used and useful facilities simply by "converting them into operating expenses through amortization." 532 A.2d at 332. (App. 15a). This interpretation is, of course, consistent with the express language of the section of the Pennsylvania Public Utility Code at issue, which states that the costs of non-used and useful facilities "shall not be made a part of the

rate base nor otherwise included in the rates charged by the electric utility."

While as a matter of ratemaking policy, a number of regulatory jurisdictions have determined that the costs of abandoned plants may be recovered from ratepayers, utilities have no constitutional right to a return on or a return of investment in plant which is not used and useful to ratepayers.*

The sole issue remaining, therefore, is whether this Court's decision in FPC v. Hope Natural Gas Co., 320 U.S. 591

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* It should be noted that a number of cases have called into question the issue of whether the application of the used and useful principle is constitutionally required. See Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1987), Washington Gas Light Co. v. Baker, 188 F.2d 11 (D.C. Cir. 1950), cert. denied, 340 U.S. 952 (1951). In this appeal, however, the issue is whether the application of this principle is constitutionally permissible.

(1944), recognized some additional constitutional right for utility investors over and above a right to charge ratepayers for the cost of used and useful assets.

As set forth in the following section of this Argument, it is OCA's position that the Hope decision does not support such an expansion of utility investor rights. Moreover, even if such an interpretation of Hope were valid in certain cases, the present case certainly isn't one of them.

B. The Appellants' Argument Is Not Supported By The Decision Of This Court In FPC v. Hope Natural Gas Co.

The thrust of the Appellants' argument here is that the Pennsylvania Supreme Court's interpretations of the state Public Utility Code and the used and useful principle violate the United States Constitution "by precluding the

state ratemaking agency from considering constitutionally pertinent factors." Jurisdictional Statement at i. These "constitutionally pertinent factors" are purportedly distilled from this Court's decision in FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

In making this argument, the Appellants disregard the fundamental teaching of this Court's decision in Hope.

If the Hope case stands for anything, it is the proposition that this Court will not examine the minutiae of utility ratemaking decisions in order to determine whether each element of those decisions is constitutional. Rather, the Court said, it will look to the "end result" of those decisions. As stated by the Court:

> Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. It

> is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.

320 U.S. at 590.

The Court in Hope thus essentially adopted the view of the concurring opinion of Justice Douglas (the author of the Hope opinion), Justice Black and Justice Murphy in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 607 (1942), that:

> Irrespective of what the return may be on "fair value," if the rate permits the company to operate successfully and to attract capital all questions as to "just and reasonable" are at an end so far as the investor interest is concerned.

(Emphasis added).

The decision in Hope put an end to an era of federal judicial intervention in ratemaking decisions in which the courts, including the lower court in the Hope case, had ruled that, as a matter

of constitutional right, the "fair value" of the property on which a utility's rates were set had to include some measure of present value or reproduction cost, rather than be based upon the original or historical cost of the property. The thrust of the Hope decision, therefore, was to limit the role of the federal courts in examining the minutiae of regulatory rate decisions and, particularly, to insure that those courts remained out of the business of determining how the value of utility property in rates must be calculated.

That the Hope decision was intended to serve as a basis for judicial restraint in the review of ratemaking decisions and not as a source of newly created constitutional rights for utility investors was made abundantly

clear in a unanimous Supreme Court Opinion issued in 1945, just one year after the Hope case was decided. Market Street Railway Co. v. Railroad Commission, 324 U.S. 548 (1945).

In Market Street Railway, a financially distressed street railway company argued that the rate it had been granted was "confiscatory by the tests of Federal Power Commission v. Hope Natural Gas Co.," because it did not insure the financial integrity of the enterprise. Id. at 566. In the Opinion by Justice Jackson, the Court responded:

> It was noted in the Hope Natural Gas case that regulation does not assure that the regulated business make a profit. 320 U.S. at 603; see Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 590. All that was held was that a company could not complain if the return which was allowed made it possible for the company to operate successfully.

Id. (emphasis added).

In Market Street Railway, the Court upheld a six-cent fare, which allowed the company a six percent return on a rate base of $7,950,000. 324 U.S. at 557. This rate base valuation, which was equal to the price at which the company had offered to sell its operating properties to the municipality which it served, was attacked by the utility as confiscatory, id. at 564, but was upheld by this Court even though the book value of the company's property was $41,768,505 and a valuation study of the properties' "historical reproduction cost" indicated a current value of $25,343,543. Id. Indeed, the Company argued that the valuation of its property

> did not consider reproduction cost, historical cost, prudent investment, or capitalization bases, on any of which under conventional accounting the six-cent fare would produce no return on its property and would force a substantial operating deficit upon the Company.

Id. at 553-54 (emphasis added). As noted above, the Court rejected the Company's contention that the rate order was "confiscatory" under the Hope case. Rather, Justice Jackson wrote in the Court's unanimous opinion that:

> Without analyzing rate cases in detail, it may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historic valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

Id. at 567 (emphasis added).

The above analysis is particularly relevant here. The potential value of

the utilities' investment in the plants at issue "vanished" when those plants were cancelled by the utilities as a result of economic forces.* Even if that investment was prudently made, the Court held in Market Street Railway, the Constitution does not mandate that the value of the investment be restored at the expense of ratepayers.

Nor is this position altered by this Court's subsequent opinion in the Permian Basin Area Rate Cases, 390 U.S. 747 (1968). There, after acknowledging the investor interests identified in Hope, the Court noted that, while these criteria "remain pertinent," they "scarcely exhaust the relevant

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* The reasons for the utilities' decision to cancel these units are discussed at page 4 of the Appellants' Jurisdictional Statement. These factors included a sharp decline in expected growth of electricity demand and the accident at Three Mile Island.

considerations." Id. at 791. The Permian Basin decision also reiterated the rulings of the Court in FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942), that the "just and reasonable" standard of the Natural Gas Act "coincides" with the applicable constitutional standards, and that "any rate selected from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory." 390 U.S. at 770.

In the present appeal, the Companies have not alleged -- nor could they allege with any degree of veracity -- that the disallowance of their claims for cancelled plant costs would turn the overall substantial rate increases granted in these cases from a constitutional to an unconstitutional "end result". It would be an exceedingly

small "zone of reasonableness" if this Court were to hold, as a matter of constitutional law, that the $105,850,000 annual rate increase granted by the Commission in the Duquesne rate case would be transformed into an unconstitutional taking if that increase were reduced to $102.4 million as a result of the disallowance of the Company's abandoned plant claim. Similarly, Penn Power cannot reasonably allege that the difference between the $15,364,000 rate increase it received and the $14.4 million increase it would have received if its abandoned plant claim had been denied renders the end result unconstitutional.

In their arguments to this Court, the Companies are claiming that their investors have a constitutionally protected interest in the recovery of this particular investment. Yet, this

is the very antithesis of the type of argument which a utility must make in order to make even a colorable constitutional claim under the Hope case. As stated by the Court: "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." Hope, 320 U.S. at 602 (emphasis added).

The Hope case does not mandate, nor does it outlaw, any particular rate-making methodology or any particular treatment of any specific investment. The investor interests described in Hope clearly pertain to the overall level of rates, not to the investment in any particular asset. Even if Hope were interpreted to support a constitutionally protected investor interest in an overall rate level that permits a financially viable utility, this

interest simply has not been brought into issue by the relatively minor rate adjustments that may result from the Pennsylvania Supreme Court decision in this case.

For this reason, the Appellants' reliance on the decision of the D.C. Circuit Court of Appeals in Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987) (en banc) is also misplaced. In that case, the utility appealed FERC's summary rejection of its request for a hearing on whether its claim for a partial return on abandoned power plant costs (or, alternatively, for a higher return on its other assets) was appropriate under the Hope end result test. FERC denied the company a hearing, even though the Company alleged that it was in significant financial distress and that the rate increase requested was

"the minimum necessary to restore the financial integrity of the Company." 810 F.2d at 1178. Writing for the majority of a sharply divided court, Judge Bork stated that Jersey Central was entitled to a hearing on its claims. Judge Bork carefully limited the scope of the Court's holding, however, as follows:

> Under Hope, as we have stated repeatedly, the only circumstances under which there is a possibility of a taking of investors' property by virtue of rate regulation is when a utility is in the sort of financial difficulty described in Justice Douglas' opinion. If a utility is in that state, the Commission must inquire whether a reasonable return -- on investment, not on facilities -- has been afforded to investors, taking into account whether any higher return would amount to exploitation of consumers. Under those circumstances, it may be permissible or even proper to grant the utility a greater return on its prudent investments than it otherwise would have received. But absent the sort of deep financial hardship described in Hope, there is no taking, and hence no obligation to compensate, just because a prudent investment has failed and produced no return.

Id. at 1181 n.3 (emphasis added).

While the OCA has argued -- and the Pennsylvania Supreme Court has held, see Pennsylvania Electric, supra -- that the used and useful principle may be applied even where the application of that principle results in financial distress to the utility, the point here is that the Jersey Central decision is not even relevant to the facts of this case.

In the rate case here on appeal, Duquesne Light Company was authorized to earn a 16.14 percent common equity return and 11.64 percent overall return on a rate base of nearly $1.8 billion. (App. 19c, 93c). The total allowed annual revenues to the Company resulting from the $105,850,000 rate increase was more than $800 million. (App. 126c). Clearly, the $3.5 million annual

amortization for cancelled plant costs which would be disallowed under the Pennsylvania Supreme Court's Order would have a relatively minor effect on the "end result" of the Commission's Order.

Similarly, in its rate case, Penn Power was authorized to charge a 15.72 percent return on common equity and a 12.02 percent overall return on a rate base of approximately $400 million. (App. 5e, 48e). The Company's $15,364,000 rate increase in this case brought its total annual revenues to $184,186,000. (App. 3e, 4e). Penn Power's annual amortization claim for the cancelled plants at issue here amounted to $956,967.

While the present case presented an important issue of state public utility law and public policy, and the OCA does not contend that the amounts involved are de minimis, the OCA submits that

this issue and this case come nowhere close to raising the "taking" issue addressed by the majority opinion in Jersey Central, supra.

Even if there could be a case in which the denial of recovery of cancelled plant costs raises a taking issue under the Hope end result test, this case certainly isn't it.*

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* Appellants' reliance on confiscation cases from outside the ratemaking context is also misplaced. Jurisdictional Statement at 23-24 and notes 24, 25. Thus, for example, while the case of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) did involve only a small area of physical intrusion, the Court made it clear in that case that, where government action involves the "permanent physical occupation of property", a taking will be found "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434-35. Moreover, the Court in Loretto reiterated the statement in Andrus v. Allard, 444 U.S. 51, 66 (1979), that

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footnote continued

C. The Appellants' View Of The Role Of State Legislatures In The Ratemaking Process Is Not Supported By Hope. Moreover, The Appellants' Attacks On The Pennsylvania Legislative Process In This Case Are Unwarranted And Do Not Constitute Grounds For Reversal By This Court.

The Appellants' challenge to the Pennsylvania Supreme Court decision extends to all the ratemaking provisions of the Pennsylvania Public Utility Code. See Jurisdictional Statement at 11, note 9; Appellants' Appendix L. The constitutional deficiency of these

continuation of footnote

"loss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a takings claim." 458 U.S. at 434, note 10. In the present case, the sole impact of the disallowance ordered by the Pennsylvania Supreme Court is to reduce by a slight margin the Appellants' overall profit levels. The Appellants were not prohibited from constructing the plants by the PUC or any governmental authority, nor was there a physical intrusion of any kind.

provisions, according to the Company, is that they purportedly "prohibit any consideration of selected constitutionally pertinent facts in fixing utility rates." Jurisdictional Statement at 17 (emphasis in the original). Thus, any ratemaking statutes which contain per se rules -- such as the exclusion of costs of non-used and useful investments -- must be unconstitutional in Appellants' view, because such rules preclude the "balancing" of investor and ratepayers interests mandated in Hope.

The OCA submits that Appellants' view of the legislative and ratemaking process stands the Hope decision on its head. As demonstrated in the previous section of this Argument, under Hope, it is the "total effect of the rate order" which is relevant to any constitutionally protected investor interests. 320

U.S. at 590. While each component of a Commission decision must be consistent with state law and supported by substantial evidence, see, e.g., Pennsylvania Power & Light Co. v. Pennsylvania Public Utility Commission, 101 Pa. Commw. 370, 373-74, 516 A.2d 426, 429 (1986), this Court made it clear in Hope that a rate determination cannot be deemed deficient on federal constitutional grounds unless the overall end result is so low as to be confiscatory. As long as the end result is not constitutionally deficient, the Court said in Hope, "[t]he fact that the method employed to reach that result may contain infirmities is not then important." 320 U.S. at 602.

Under the Appellants' apparent view of public utility regulation, the ratemaking chapters of the public

utility codes of each of the 50 states would only be allowed to consist of one sentence: "Rates must be just and reasonable." Indeed, since the just and reasonable standard has been held to "coincide" with the standards of constitutional review, a simple reference to the Fifth and Fourteenth Amendments to the Constitution would suffice, and the need for any public utility code would be eliminated. The OCA submits that such a position is absurd on its face and, in any case, is not constitutionally required.

The Pennsylvania General Assembly has, in fact, established in Section 1301 of the Public Utility Code, 66 Pa. Cons. Stat. §1301, that all rates charged by Pennsylvania utilities must be "just and reasonable." Like many state legislatures, however, the Pennsylvania legislature has not chosen

to issue a one-sentence long Public Utility Code. Rather, the General Assembly has gone on to provide specific substantive and procedural directions to the Public Utility Commission which must be followed by the Commission in setting just and reasonable rates. These provisions do not repeal the overriding statutory and constitutional requirement that overall rate levels must be just and reasonable. Rather, they provide specific instructions on how certain sub-issues must be addressed in making that ultimate determination. While the legislature theoretically could have granted its ratemaking agency absolutely unbridled discretion in setting rates under the just and reasonable standard, it has chosen not to do so. There is certainly nothing constitutionally defective about this choice,

particularly since the Pennsylvania Public Utility Code retains the just and reasonable standard as its overriding rate requirement.

In arguing that absolute discretion for commissions is constitutionally required, the Appellants clearly misperceive the relative standing of the state legislatures and the state public utility commissions in the ratemaking process.

Public utility commissions are nothing more than administrative arms of the state legislatures which create them. As stated by the Pennsylvania Supreme Court in the present case:

> It is clear, beyond any need for citation, that the function of ratemaking for public utilities is legislative in nature. The Commission is but an instrumentality of the state legislature for the performance of that function; and the agency has only such powers as are expressly conferred upon it by statute or exist by necessary implication.

532 A.2d at 339. (App. 30a). See also Minnesota Rate Cases, 230 U.S. 352, 433 (1912) ("The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either.")

Since the state legislatures could (and formerly did) set the rates of the utilities in their jurisdictions themselves, it is certainly within their powers to provide specific statutory directions to the commissions they have created to carry out those duties. Unless such specific legislative directions necessarily preclude the setting of just and reasonable rates on an

overall basis, they cannot be found, in and of themselves, to be unconstitutional.

In the present case the Appellants add little to their argument by attacking the Pennsylvania General Assembly as "incoherent" and "manipulative" in their "tinkering" with the Public Utility Code. Jurisdictional Statement at 17, 20. No doubt, utilities would prefer to set their own rates, but because of their natural monopoly status, such legislative "tinkering" has been deemed to be an economic necessity in this country for at least the last 100 years. See, e.g., Munn v. Illinois, 94 U.S. 113 (1876); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944) ("The primary aim of this legislation [the Natural Gas Act] was to protect consumers against

exploitation at the hands of natural gas companies.")

As evidence of the "lack of coherence" in the Pennsylvania ratemaking process, the Appellants cite the fact that the Pennsylvania General Assembly has now amended the Public Utility Code to permit the recovery of cancelled plant costs. Section 520 of the Public Utility Code, 66 Pa. Cons. Stat. §520. Jurisdictional Statement at 20. The Appellants note that this amendment was applied only prospectively, that is, to plants cancelled after the enactment of the statute on October 10, 1985. Appellants note somewhat cryptically that this date was "conveniently subsequent to the well-known January 22, 1980 cancellation date of the four CAPCO units." Id.

What Appellants fail to point out to this Court is that the primary -- and

indeed, to date, the sole -- beneficiary of this legislative "manipulation" has been Duquesne Light Company. Just prior to its 1986 rate case before the PUC, Duquesne announced the abandonment of its interest in the completion of the partially constructed Perry 2 nuclear power plant. At the time, the Company had invested $154.1 million in Perry 2. In its rate order in Pennsylvania Public Utility Commission v. Duquesne Light Co., No. R-860378 (Pa. PUC, March 10, 1987), the Commission approved the Company's request to charge that entire amount to ratepayers over a ten-year period at a rate of $15.4 million per year. Slip. Op. at 86-91 (Available on Lexis, Pa. Library, PA PUC File). The Commission stated that it was approving the amortization "in accordance with Section 520 of the Public Utility

Code". Id. at 91. No appeal on this issue was taken by any party.

The OCA submits that this statutory change was not the result of either manipulation or incoherence, but rather illustrates the proper exercise of public policy determinations by a state legislature. In balancing the interests of ratepayers and investors, the General Assembly determined that it was appropriate to create a specific exception in Section 520 to the general rule of Section 1315 against the inclusion in rates of the costs of non-used and useful property. Like many legislative enactments, this law was put into effect prospectively only, and thus applied to Duquesne's substantial investment in Perry 2, but not to its much lesser claim for the costs of the plants involved in this case. If anything, the

fact that the law in Pennsylvania has now been amended to permit the very result requested by the Appellants in this case makes the present appeal even less of an appropriate candidate for plenary consideration by this Court, and makes the Appellants' attack on the Pennsylvania General Assembly's actions all the more inexplicable.

More importantly, however, regardless of one's views of the legislative process in this case, it is not the province of this Court to substitute its economic and policy judgments for those of the Pennsylvania General Assembly. As stated by Justice Black in his Opinion for the Court in Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1962):

> We refuse to sit as a "super legislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause

> "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.

(Footnotes omitted).

Contrary to the Appellants' arguments here, the OCA submits that the Pennsylvania General Assembly has acted properly in setting forth specific directions to the Public Utility Commission in carrying out its duties to set public utility rates which are just and reasonable to both ratepayers and investors. While the Appellants may prefer certain of those directions over others, that is a matter of no constitutional moment and is certainly not a proper grounds for appeal to this Court.

CONCLUSION

Appellants have raised no substantial federal questions which would merit plenary consideration by this Court. The Pennsylvania Office of Consumer Advocate therefore respectfully urges the Court to dismiss this appeal. Alternatively, the Court should affirm the October 15, 1987, Opinion of the Pennsylvania Supreme Court in this matter.

Respectfully submitted,

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